[ORAL ARGUMENT SCHEDULED FOR DECEMBER 9, 2016]
Nos. 15-1074, 15-1130

In the United States Court of Appeals
for the District of Columbia Circuit

AMPERSAND PUBLISHING, LLC, D/B/A SANTA BARBARA NEWS-PRESS,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

GRAPHICS COMMUNICATIONS CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS
Intervenor for Respondent/Cross-Respondent

On Petition for Review of an Order
of the National Labor Relations Board

PETITIONER'S REPLY BRIEF

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GLOSSARY OF ABBREVIATIONS & ACRONYMS

Term	Abbreviation
Administrative Law Judge	ALJ
Brief for the National Labor Relations Board	R.B.
Federal Labor Relations Authority	FLRA
Graphics Communications Conference International Brotherhood of Teamsters	the Union
Intervenor's Brief	I.B.
National Labor Relations Act	NLRA or the Act
National Labor Relations Board	the Board or NLRB
Ampersand Publishing, LLC, d/b/a Santa Barbara News-Press	the News-Press
Opening Brief of Petitioner Ampersand Publishing, LLC, d/b/a Santa Barbara News-Press	P.O.B.
Unfair Labor Practices	ULPs

RELEVANT STATUTORY PROVISIONS

All relevant statutory provisions are set forth in Petitioner's Opening Brief.

SUMMARY OF ARGUMENT

The News-Press has, since the beginning of its dispute with the Union ten years ago, pursued a singular, central defense. Namely, that the formation of the Union to seize editorial control of the News-Press, manipulating content-related decisions, and the actions of the Union in furtherance of that purpose—endorsed by the Board through its countless enforcement actions in defiance of three federal-court decisions—violate the First Amendment rights of the News-Press.

For just as long, the Union and the Board have forcefully fought that conclusion in administrative proceedings, in the federal courts, and in the media. It was not until December 2012, when this Court released its decision in *Ampersand Publishing, LLC v. NLRB* (*Ampersand I*), 702 F.3d 51 (D.C. Cir. 2012), that the Union arguably backed down from its position that it had the legal authority to demand control over the way the News-Press reported the news. Until that time, at the bargaining table and away from it, the Union and its representatives maintained that the NLRA protected employees' efforts to organize around the issue of editorial control.

The Union has advanced its primary goal by, inter alia, harassing the News-Press with countless, unjustifiable ULP charges

in hopes that the company would submit. And it used the officials and processes of the Board as tools to forge an unprecedented shift in constitutional law, transferring the protections of the First Amendment freedom of the press from newspaper owners to newsroom employees. While that scheme is arguably going on to this day, it is not arguable that it was being employed when the alleged ULPs at the heart of this case were filed, i.e. between 2007 and 2009. Those charges are undeniably related to the employees' primary organizing purpose and part of a *continued* pattern of harassment by former News-Press employees, the Union, and the Board to interfere with the News-Press' editorial control. For that reason, the First Amendment shields the News-Press from liability in this case and the charges should have been dismissed.

Feigning surprise that the News-Press would raise the First Amendment defense on appeal, the Board and the Union contend that, pursuant to 29 U.S.C. § 160(e), this Court lacks jurisdiction to entertain the argument because, they claim, the News-Press brings it for the first time on appeal. Wrong. From the beginning, the News-Press has stated that the constitution protects the company here because the Union and its employee members have continuously (and improperly) sought to acquire First Amendment rights of expression that rightly belong to the newspaper's

publishers. But even if the News-Press has not sufficiently preserved its specific argument, "extraordinary circumstances" exist, authorizing the Court to hear it for the first time on appeal.

For these reasons, and those described further in the News-Press' opening brief, the Court should grant the News-Press' Petition for Review, vacate the Board's decision and order, and deny the Board's cross-application for enforcement.

ARGUMENT

I. THE BOARD'S DECISION IS PART OF AN ONGOING EFFORT TO SEIZE EDITORIAL CONTROL FROM THE NEWS-PRESS IN VIOLATION OF THE FIRST AMENDMENT; IT MUST BE OVERTURNED BECAUSE IT ARMS THE UNION WITH GOVERNMENT AUTHORITY TO ACCOMPLISH ITS IMPROPER PURPOSE

The Board and Union, as they did in the proceedings below, twist the News-Press' First Amendment defense into the simple-minded and oft-rejected contention that the paper is somehow immune from the Act by virtue of its status as a newspaper and because its employees had "engaged in unprotected conduct in the past." R.B. 76 (citing P.O.B. 20-31; *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937); *Newspaper Guild of Greater Phila. v. NLRB*, 636 F.2d 550 (D.C. Cir. 1980)); *accord* I.B. 3-5, 13-14.

The News-Press makes no such claim.

It is instead making a more nuanced argument based on the unique factual history of this long-simmering dispute. P.O.B. 20-31.

To reiterate, the News-Press contends that because its employees organized primarily for the illicit purpose of seizing editorial control, *Ampersand I*, 702 F.3d at 58-59, *McDermott v. Ampersand Publ'g, LLC* (*McDermott II*), 593 F.3d 950, 960 (9th Cir. 2010), *McDermott v. Ampersand Publ'g LLC* (*McDermott I*), No. 08-1551, 2008 WL 8628728, at *11-12, 14 (C.D. Cal. May 22, 2008), the regular filing of ULPs by the Union and the Board's unrelenting prosecution of those ULPs—*in furtherance of that improper goal*—violate the First Amendment rights of the newspaper. Any particular ULP charge, though debatably unrelated to content control on its face, is part of an ongoing, unconstitutional campaign to coerce the publishers to either bow to the Union's editorial demands or close their doors, forever silencing their voices.

Indeed, with 26 ULP charges against the News-Press pending before various tribunals and at least 19 others having been resolved, the News-Press has been forced to defend itself on several fronts *for more than a decade*, incurring *millions of dollars* in legal costs—all because it dared to resist the Union's unlawful demands that Ms. McCaw surrender control of the paper's content. The impact of those attacks necessarily relates to and annihilates the publishers' First Amendment right to direct the content of the newspaper. This is especially true if the Union and the Board

ultimately succeed in regulating the News-Press into bankruptcy and closure through the regular filing and prosecution of dubious ULPs aimed at draining the company's coffers—the proverbial "death by a thousand cuts."

Naturally, no distinct ULP can be separated from this broader scheme because each stems directly from the improper First Amendment goals of the Union. News-Press employees organized *primarily* to rob the publishers of their First Amendment freedoms, using the force of law to get their way. *See Ampersand I*, 702 F.3d at 58-59; *McDermott II*, 593 F.3d at 954-55, 960; *McDermott I*, 2008 WL 8628728, at *11-12. This is far from a case where union members had merely engaged in some discrete, past "unprotected conduct" creating wounds that can be healed with time. *See* R.B. 76 (citing P.O.B. 20-31, 81-82); I.B. 12 (citing *Press Co. v. NLRB*, 118 F.2d 937, 954-55 (D.C. Cir. 1940)). Rather, they continued in pursuit of their unlawful objective at all times relevant to this case. They cannot hide behind the protections of the Act while that goal persists.

As this Court held in *Ampersand I*, employees cannot "extend [section] 7's protections by wrapping an unprotected goal in a protected one, by tossing a wage claim in with their quest for editorial control." 702 F.3d at 58. For "the First Amendment wholly

favors protection of the employer's interest in editorial control, the *main* issue in dispute; it is hard to imagine that employees can prevail over that simply by adding "a few verses" of wage demands. *Ampersand I*, 702 F.3d at 58 (citing *United States v. A Motion Picture Film Entitled "I Am Curious-Yellow"*, 404 F.2d 196 (2d Cir. 1968) (Friendly, J., concurring)).

The Board maintains that *Ampersand I* and the *McDermott* cases are distinguishable because the Union never made "a specific demand … regarding the publisher's preparation of content for its newspaper …." at the bargaining table. R.B. 76-77 (quoting *McDermott I*, 2008 WL 8628728, at *11). And, citing cases holding that a court need not assume that motives actuating a union are "immutable" or that subsequent conduct is attributable to past motives, both the Board and the Union implore the Court to trust that, after certification, the Union retreated from its earlier calls for content control. R.B. 77 (citing generally *NLRB v. Fla. Med. Ctr., Inc.*, 576 F.2d 666, 674 (5th Cir. 1978); *accord* I.B. 10-13 (citing *Press Co.*, 118 F.2d at 944-45).

In other words, they insist that the Union was suddenly no longer interested in pursuing the very goal its employee members elected it to pursue. Even if the Court were to suspend disbelief and accept that the Union would abandon its members' interests in that

manner, it would not negate the reality that the Union: (1) *did* advance specific editorial demands through bargaining; (2) made statements indicating that it had not abandoned its organizing purpose; and (3) filed various ULPs that directly impact the publishers' editorial prerogative.

First, the record establishes that, from the beginning of bargaining, the Union pressed for editorial control via aggressive content-related proposals disguised as matters of "employee integrity" and "work assignments." *See, e.g.*, G.C. Ex. 18 ("Union's Opening Proposals" discussed and cited in P.O.B. at 70); *see also* R.B. 71 (stating that the parties "had some discussion of" employee-integrity and work-assignment proposals (quoting Tr. 2650-51)). While those proposals were ultimately watered down, the Union expressly threatened to file a ULP alleging that the News-Press refused to bargain over one such proposal, hoping to compel the company to discuss matters of content control. G.C. Ex. 84 (Union letter to News-Press counsel, discussed and cited in P.O.B. at 70-72).[1] The tactic was a crystal-clear expression that the Union had

[1] The Board argues that the proposal at issue, a "byline protection clause," would not "impinge[] on a newspaper publisher's right to control the content of its product." R.B. 69 (citing *Ampersand Publ'g, LLC*, 359 N.L.R.B. No. 127, 1-2 n.5 (May 31, 2013)). But *Westinghouse Broadcasting*, the NLRB case cited by the Board, does not suggest that byline clauses never touch upon editorial control, merely that they are "bargainable." 285 N.L.R.B.

not, post-certification, divorced itself from its primary organizing purpose. This is hardly surprising. For the Union's bargaining committee was dominated by the very individuals who led the charge for content control during the organizing campaign. Tr. 59 (identifying Dawn Hobbs, Melinda Burns, Tom Schultz, Ira Gottlieb, and Nick Caruso).

Second, away from the bargaining table, the Union and its representatives continued to pursue their unconstitutional aim in both the court of law and the court of public opinion.

Throughout the course of litigating the *McDermott* cases, the Union was outspoken in its insistence that its organizing purpose was protected by the NLRA and that its activities would not infringe on the News-Press' rights of expression.[2] It refused to accept the

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205, 215 (1987). While it might be interpreted that such clauses are mandatory bargaining subjects, at least one circuit court has held that "[n]o inference of bad faith can be drawn from the[ir] rejection" by a publisher-employer. *Compare Westinghouse*, 285 N.L.R.B. at 215, *with NLRB v. Knoxville Publ'g Co.*, 124 F.2d 875, 881 (6th Cir. 1942).

That point should be especially well-taken here, where the core of the dispute has always been about who decides what is or is not printed. The News-Press did not act in "bad faith" in rejecting the byline proposal, and the Union's threat to file a ULP over that rejection only serve to reinforce the Union's improper First Amendment objective.

[2] *See* Union Amicus Curiae Memorandum, *McDermott I*, No. 08-1551, 2008 WL 8628728 (C.D. Cal. Mar. 7, 2008), 2008 WL 2132562; Union Supplemental Amicus Curiae Memorandum, *McDermott I*, No. 08-1551, 2008 WL 8628728 (C.D. Cal. Apr. 17,

rejection of that position by both the Central District of California and the Ninth Circuit, continuing to press its cause when the case returned to a panel of the Board in 2010. And it took the same position when that Board decision was on review by this Court in *Ampersand I*.[3]

Outside the courtroom, Union leaders aired their concerns about "journalistic ethics" and "autonomy" (code for "content control") in the media. For instance, in June 2007, Union bargaining committee member Melinda Burns declared in a televised appearance that she "would never have believed that the newsroom where [she] work[ed] for 21 years would so proudly collapse and fall victim to a publisher who has no respect ... for the *freedom of the press*[.]" Tr. 305 (emphasis added). And in March

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2008), 2008 WL 2132565; Union Amicus Curiae Brief in Support of Request for En Banc Rehearing at 8-10, 18, *McDermott II*, 593 F.3d 950 (9th Cir. 2010), ECF No. 54-2.

The Court may judicially notice the various documents filed in federal court or with the NLRB cited herein. *See Vince v. Mabus*, 956 F.Supp.2d 83, 88 (D.D.C. 2013) ("A court may take judicial notice of public records from other proceedings."); *Rimkus v. Islamic Repub. of Iran*, 750 F.Supp.2d 163, 171 (D.D.C. 2010) (judicial notice "extends to . . . court records in related proceedings").

[3] Union Brief in Support of NLRB, 10-16, Ampersand I, 702 F.3d 51 (D.C. Cir. 2012); Transcript of Oral Argument at 38:1-16, 18-20, Ampersand I, 702 F.3d 51 (D.C. Cir. 2012); Oral Argument, Ampersand I, 702 F.3d 51 (D.C. Cir. 2012), https://www.cadc.uscourts.gov/recordings/recordings2013.nsf/19BB470E4E65D94885257BC9005AAC15/$file/11081211-1284.mp3 (audio).

2008, while bargaining was ongoing, Union lead negotiator Nick Caruso explained to the press that the Union had concerns over wage increases, the at-will-employment policy, and employee grievance procedures, but that such "skirmishes remain[ed] far from the *heart of the matter: policies on the ambiguity that is journalistic ethics.*" Chris Meagher, *News-Press, Union Negotiations Crawling Along Slow and Steady*, Santa Barbara Independent (Mar. 6, 2008), http://www.independent.com/news/2008/mar/06/emnews-pressem-union-negotiations-crawling-along/. Since that time, Union leaders have had few kind words for the judges who rejected the premise that the Act protects efforts aimed at seizing editorial control of a newspaper.[4]

Third, various ULPs and the Board-ordered remedies imposed in this case directly suppress the News-Press' publishers' ability to

[4] Melinda Burns & Dawn Hobbs, *News-Press Mess: The 10th Anniversary*, Santa Barbara Independent, (July 6, 2016), http://www.independent.com/news/2016/jul/06/news-press-mess-10th-anniversary/ ("The D.C. court was dominated by Republican appointees hostile to government regulation and the cause of labor. In a distortion of the First Amendment, …, a panel of three right-wing judges ruled that by raising the issue of journalistic integrity as part of a union organizing campaign, we had attempted to seize editorial control of the *News-Press*."); *accord* Melinda Burns, *Wendy's Win: Three Arch-Conservative D.C. Justices Rule for McCaw*, Santa Barbara Independent (Dec. 18, 2012), http://www.independent.com/news/2012/dec/18/wendys-win/.

make decisions about the content of the newspaper. The starkest example, perhaps, is the Board's holding that the News-Press violated the NLRA when it made the editorial decision to cancel its "gossip column" and thus laid off Richard Mineards without first negotiating with the Union. *Ampersand*, 358 N.L.R.B. No. 141, 38-39. But the order assumes that the Union had any business demanding the News-Press bargain over the lay-off in the first place. *See* P.O.B. 28-31 (discussion regarding constitutional infirmity of requiring newspaper to bargain over reporter staffing decisions). An assumption that is decidedly incorrect.

Newspaper publishers have the absolute authority to determine the contents of their papers. *Ampersand I*, 702 F.3d at 56 (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1557-58 (D.C. Cir. 1984)). Whether to print a "gossip column," the *only* content that was generated by Mineards before his lay-off and which was not resumed by an employee after, Tr. 34, 69-70, 889, is squarely a content limitation, the likes of which the Union cannot require bargaining over. But the Union demanded it nonetheless. And it filed a ULP when the outcome was not to its liking—yet again signaling its intention to continue its campaign to manipulate the editorial decisions of the News-Press.

In sum, while the Union and the Board allege that the Union distanced itself from its primary organizing purpose long ago, I.B. 10-13; R.B. 76-78, the very proposals it brought to the bargaining table, the statements attributed to and penned by its top representatives (as recently as July 2016), and its penchant for filing ULPs over content-related decisions certainly suggest otherwise. Indeed, in the face of repeated expressions of continued support for the illicit purpose that drove the organizing campaign, it is obvious that the "taint" of the employees' pre-certification efforts to acquire control of the newsroom carries over into the consolidated complaint here.

Ultimately, the Court should not ignore the larger context of this case or focus myopically on whether enforcement of any individual charge or remedy directly "compel[s] the Company to publish what it prefers to withhold." R.B. 80 (quoting *Passaic Daily News*, 736 F.2d at 1557). First Amendment considerations have permeated *nearly every aspect of this dispute* dating back to the Union's earliest calls for editorial control. There is simply *no way* to separate the First Amendment issues in this case from seemingly unrelated labor quibbles. *Ampersand I*, 702 F.3d at 58-59. This Court should thus follow the lead of the *Ampersand I* panel, which "vacate[d] the Board's order and den[ied] the cross-application for

enforcement *without addressing the parties' arguments regarding the details of the individual violations the Board found ....*" *Id.* at 59 (emphasis added). It should refuse to place a stamp of approval on the continued harassment of the News-Press by the Union and the Board in retaliation for the publishers' unfaltering assertion of their constitutional rights.

II. THE NEWS-PRESS DID NOT WAIVE ITS FIRST AMENDMENT ARGUMENT

A. The Court Has Jurisdiction to Hear the News-Press' First Amendment Argument

The Board and the Union contend that the News-Press waived its First Amendment arguments under 29 U.S.C. § 160(e), section 10(e) of the NLRA. The claim is patently untrue. The News-Press raised the defense repeatedly in the proceedings below. Indeed, the First Amendment theory that the News-Press brings on appeal was a fundamental theme running through the entire case, having been addressed by all parties in written filings and during oral argument. To the extent that the company did not address the precise contours of its defense below, including the impact of the *Ampersand I* decision, "extraordinary circumstances" exist such that section 10(e) waiver does not apply. The Court has jurisdiction to consider the News-Press' arguments on appeal.

1. The News-Press Not Only Raised the First Amendment Issue Below, the Parties Discussed It Often Throughout the Hearing and in Briefing

It is true that section 10(e) generally bars the introduction of arguments or defenses on appeal unless they were previously raised before the Board. 29 U.S.C. § 160(e); *accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). But that rule does not apply here. The News-Press has often and vigorously pressed its claim that the First Amendment protects it from the actions of a union whose primary goal is to gain editorial control of the newspaper and from a governmental agency's prosecution of ULPs to legitimize that illicit goal.

The Board's and Union's contention that the News-Press had not preserved the issue simply reflect the parties' proclivity for playing fast and loose with the administrative record. Their position relies on a footnote bleeding off the page of a vacated (and later reaffirmed) Board order denying the News-Press' motion for reconsideration, observing that it did not address whether *Ampersand I* warranted reconsideration of any ULP violation found or remedy ordered. R.B. 72-73 (citing *Ampersand*, 359 N.L.R.B. No. 127, 1-2 n.5); I.B. 3. But neither the Board nor the Union seem to have seriously combed through the record. For it is rife with references to the News-Press' central contention that the First

Amendment protects the News-Press from the filing and prosecution of ULPs brought by a Union with a singular and improper purpose—to wrest editorial control from the newspaper publishers who hold it. The briefs of the Board and the Union fail to explain why, if the News-Press never raised the argument, all the parties addressed it throughout the course of the proceedings below. *See* R.B. 24; 71-76; I.B. 3.

The hearing before ALJ Anderson alone contains dozens of references to the issue, addressing at length the First Amendment, content control, freedom of the press, and the impact of *McDermott I*. Tr. 41-42, 48-52, 59-61, 74-75, 80, 153, 156-60, 167, 305, 740, 776, 1031-32, 3470-75, 3480, 3505-07, 3530-40, 3544-50, 3553-58, 3575-79. In its opening statements, for instance, counsel for the Board forecasted the News-Press' First Amendment defense and mounted its (all-to-familiar) rebuttal:

> [T]his is an issue that I'm sure you're going to be hearing about from Respondent. Now, *Respondent is going to be arguing that some or all of the government's allegations are going to impact the newspaper's First Amendment right; that it's going to impact the owner's ability to control the content of the newspaper; and that that is protected under the First Amendment.*
>
> ....
>
> Nothing in the allegations that are at issue in this complaint would require the publisher to publish any content that it does not want printed. Rather, the

> instant complaint seeks to safeguard employee rights under Section 7 of the Act.
>
> As early as 1937, the Supreme Court held in *Associated Press v. NLRB* that a newspaper publisher does not have any special immunity from the application of general laws and no special privilege to invade the rights and liberties of others.

Tr. 41-42 (emphasis added).

As the Board predicted, the News-Press countered that the First Amendment was in fact implicated here, adding that this labor dispute was "unusual" insofar as its "central theme" was the Union's unprotected, ongoing crusade to seize editorial control—a goal the News-Press has resisted from Day One. In his opening statement, counsel for the company declared (as it does in this appeal) that:

> No one has ever disputed the fact that the [NLRA] controls Union activity with regards [sic] to newspapers. But what's *so very unusual* about this case is that the [Union], which is really pushing this case, has moved into another area. Not only the print area, not only the general working area, but attempting to organize newsrooms so that newsroom employees, who have a sense of identity with the content of their paper, can literally make decisions which overrule the decisions of the publisher of the paper concerning what the content of the paper is.
>
> And that has been the *central theme* of what happened here in Santa Barbara. *And our client ... has fought that from the very beginning*.

Tr. 48-49 (emphasis added). With that, the News-Press entered the opinion of Judge Wilson in *McDermott I* into evidence, illustrating that a federal court had already held that the Union was primarily formed for the (illicit) purpose of seizing editorial control. Tr. 50; Resp. Ex. 162 (*McDermott I* decision). Counsel continued to press the issue, at various points throughout the hearing, arguing about the impact of *McDermott I* and the First Amendment issues at play. Tr. 48-52, 59-61, 74-75, 80, 153, 159-60, 776, 3472, 3505, 3530-40, 3544-50, 3553-58, 3575-79; *see also, e.g.*, Tr. 3530 ("[I]t is important for you to understand because throughout my argument and throughout this case, we have made it clear to you, we have made it clear to the prior ALJ, we've made it clear to the 9th Circuit and [District Court Judge Wilson], that this is a case about content control.").

While the transcript alone includes dozens of references to the First Amendment issue, the parties' discussion of it did not end there. For example, the News-Press' Brief in Support of Exceptions explained in detail the history of the dispute, the anti-First Amendment fervor that drove News-Press employees to support the Union, and the Union's attempt to use the cloak of the NLRA to "transfer the protections of the … freedom of the Press from ownership and management to employees." Resp. Br. Supp.

Exceptions 3-5, Sept. 23, 2010 (lodged simultaneously herewith). The company clarified that this discussion was not merely a "backdrop" for the dispute, but as the parties clearly recognized at hearing, an argument that the unconstitutional conduct of the Union and the Board must be "considered relative to an analysis of this dispute," *of every single position proffered by either the Union or the General Counsel. Id.* at 5.

The Union, in its Answering Brief to Respondent's Exceptions, summarized the way it saw the News-Press' argument:

> In essence, the *News-Press* argues that the Union's proposals at the table, though lawful, are not merely not worthy of agreement, but somehow threaten its editorial and/or managerial prerogatives, thus in its view privileging it to *bargain in bad faith, and/or commit other [ULPs] such as retaliatory firings, transfer of bargaining unit work, unilateral changes, refusal to timely provide information and discouragement of employee cooperation with NLRB investigations....*

Charging Party's Ans. Br. to Resp. Exceptions 42 (emphasis added). The Union continued: "Can it really be the law, *as Ampersand contends*, that if during an organizing campaign a Union or supportive employees denounce the unethical treatment of newsroom staff, *or the paper's editorial stance*, that that newspaper's management is thereafter free to violate the NLRA at will ...?" *Id.* at 43 (emphasis added). Ultimately, in response to the

News-Press' First Amendment defense, the Union argued below exactly what it argues on appeal—much of it word-for-word. *Compare id.* at 42-45, *with* I.B. 3-5, 10-11, 13-15.

It is clear that the Union, though unfairly characterizing the News-Press' position as "the First Amendment privileges the newspaper to flout the Act," recognized in its exceptions that the company was arguing that the First Amendment protects the publishers from *all* ULP charges brought by this Union because it was organized primarily to acquire editorial control and never effectively repudiated that improper goal.

Naturally, the statements catalogued above (and those others too numerous to recount here) did not directly cite *Ampersand I*, as that decision came down more than three years later. But the News-Press regularly invoked Judge Wilson's decision in *McDermott I*, as well as the then-pending appeal in the Ninth Circuit, *McDermott II*. Both of those cases were regularly cited with approval by the *Ampersand I* panel and were heavily relied on by the News-Press in making its case in this appeal. In short, the First Amendment issue was raised below and preserved. The intervening publication of *Ampersand I*, which gave further support to the company's defense, does not change that. Nor does the Board's footnote purporting to foreclose the argument on appeal simply because *Ampersand I* was

not cited as grounds for reconsideration. *Ampersand*, 359 N.L.R.B. No. 127, 1-2 n.5.

Despite repeated references to the First Amendment argument in the record below, the Board finally contends that the News-Press had not made their arguments in terms "specific" enough to satisfy section 10(e). R.B. 72 ("[B]road language that does not put the Board on notice of specific contention is insufficient." (citing *N.Y. & Presby. Hosp. v. NLRB*, 649 F.3d 723, 733 (D.C. Cir. 2011))). True, the purpose of section 10(e) is to give the Board the opportunity to consider and pass on the issues, bringing its considerable labor law experience to bear. *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 358 (6th Cir. 1983) (quoting *NLRB v. Allied Prods. Corp.*, 548 F.2d 644, 653 (6th Cir. 1977), and citing *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 256 (1943)). Sufficient notice is certainly necessary to that end. But it is inconceivable that the Board was not on notice of the News-Press' specific concerns here. For (1) ALJ Anderson expressly dismissed the *McDermott* authorities as mere "scholarship," claiming they control "the Kocol decision not the instant proceeding," *Ampersand Publ'g, LLC*, 358 N.L.R.B. No. 141, 11 (Sept. 27, 2012); (2) the Board panel in fact analyzed the First Amendment claims on reconsideration, *Ampersand*, 359 N.L.R.B. No. 127, 1-3; and (3) the Board and Union attorneys argued

essentially the same defense below as they make here. Tr. 41-42; R.B. 76-78; I.B. 3-8, 10-15.

The record thus establishes that the News-Press properly raised its First Amendment argument; the Board weighed it and found it lacking. The News-Press is entitled to continue its defense on appeal.

2. Any Failure by the News-Press to Sufficiently Raise the First Amendment Issue Below Must Be Excused Because "Extraordinary Circumstances" Exist

Even if the publication of *Ampersand I* did, however, require the News-Press to amend its fully briefed motion for reconsideration, the failure to do so does not bar the company from relying on *Ampersand I* or asserting its First Amendment defense on appeal. Concededly, where a party could not have brought an argument at hearing or in its exceptions, it must do so in a motion for reconsideration. *See Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975); *S. Power Co. v. NLRB*, 664 F.3d 946, 949 (D.C. Cir. 2012). But, where "extraordinary circumstances" exist, the failure or neglect to urge [an] objection *shall* be excused." 29 U.S.C. § 160(e) (emphasis added). Because such circumstances exist here, any perceived

failure to assert the freedom of the press defense until appeal must be excused.

To appreciate the "extraordinary circumstances" surrounding this case, an understanding of its complicated procedural history is necessary. ALJ Anderson's decision, which dismissed the First Amendment analyses of *McDermott I* and *McDermott II* as merely "scholarship," came down on May 28, 2010. *Ampersand*, 358 N.L.R.B. No. 141, 11. The parties thereafter filed exceptions and related briefing address the ALJ's treatment of the First Amendment. Resp. Exceptions 7-8, Sept. 23, 2010; Resp. Br. Supp. Exceptions 3-5; Charging Party's Ans. Br. to Resp. Exceptions 42-43. The Board nonetheless adopted the ALJ's decision on September 27, 2012, without relevant amendment. *Ampersand*, 358 N.L.R.B. No. 141, 1-4. The News-Press filed a timely motion for reconsideration on October 25th. Motion for Reconsideration, *Ampersand Publ'g, LLC*, 359 N.L.R.B. No. 127 (May, 31, 2013). But lacking any new authority on point, the company was without cause to have the Board's rejection of its First Amendment argument reconsidered at that time.

On December 18, 2012, this Court adopted the News-Press' position in *Ampersand I*, 702 F.3d at 58-59, that the Union was motivated primarily by a desire to gain editorial control of the

newspaper in violation of the News-Press' First Amendment rights. The decision came too late to be addressed in the News-Press' Motion for Reconsideration which was due on or before October 25, 2012, *see* 29 C.F.R. § 102.48 (d)(2). The Board denied the News-Press' Motion for Reconsideration on May 31, 2013, rebuking the company for failing to cite *Ampersand I* and purporting to declare that it was barred from relying on the case in any future appeal. *Ampersand*, 359 N.L.R.B. No. 127, 1-2, n.5 (citing 29 U.S.C. § 160(e); *Ideal Mkt.*, 211 N.L.R.B. 344 (1974); *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1254-55 (D.C. Cir. 2012); *W&M Props. of Conn. v. NLRB*, 514 F.3d 1341, 1345-46 (D.C. Cir. 2008)).

Because the Supreme Court subsequently decided in *NLRB v. Noel Canning*, -- U.S. --, 134 S. Ct. 2550, 2557 (2014), that certain recess appointments to the Board were unlawful, however, the Board's May 2013 reconsideration order was set aside—only to be summarily reaffirmed by an appropriately constituted Board on March 17, 2015. *Ampersand Publ'g, LLC*, 362 N.L.R.B. No. 26, 1 (Mar. 17, 2015). In that summary decision, the Board said nothing about *Ampersand I*, though it did incorporate the vacated order by reference, allowing the Board's observation that *Ampersand I* could not be argued on appeal to stand. *Id.* On that determination, the Board rests its section 10(e) waiver analysis. R.B. 73.

In *NLRB v. FLRA*, 2 F.3d 1190 (D.C. Cir. 1993), this Court was faced with a similar jurisdictional issue. *Id.* at 1195. There, the Board challenged a union-favorable Federal Labor Relations Authority ("FLRA") decision resting on arguments raised by the union in late-stage briefing to which the Board had no opportunity to respond. *Id* The Board did not bring a motion for reconsideration of the issue; rather, it proceeded directly to the D.C. Circuit for review. *Id.* at 1196. In holding that it was not barred from considering the matter pursuant to 5 U.S.C. § 7123(c),[5] this Court held that the "almost sua sponte nature" of the agency's consideration of the issue, coupled with the FLRA's recent rejection of the contested argument in other proceedings, made pursuing a motion for reconsideration "patently futile"—an "extraordinary circumstance" excusing the NLRB's failure to act. *NLRB v. FLRA*, 2 F.3d at 1196-97 (citing *U.S. Dep't of the Interior Minerals Mgmt. Serv. v. FLRA*, 969 F.2d 1158, 1161 (D.C. Cir. 1992)).

This Court recently affirmed *FLRA*'s "patently futile" exception to waiver in the context of NLRB proceedings. *HTH Corp. v. NLRB*, 823 F.3d 668, 674 (D.C. Cir. 2016) (quoting *FLRA*, 2 F.3d at 1196; *cf. W&M Props.*, 514 F.3d at 1346). There, the Court allowed a

[5] The relevant portion of 5 U.S.C. § 7123(c) creates the same jurisdictional bar to raising new objections on review that section 160(e) does.

petitioner to challenge the Board's sua sponte award of litigation expenses as exceeding the Board's authority, where the Board had relied in part on four earlier NLRB cases holding that such was not in excess of its authority. *Id.* Noting the "patent futility" of asking the Board to reverse its sua sponte decision, the Court excused the petitioner's failure to seek reconsideration. *Id.*

Here too, a motion for reconsideration would have been "patently futile." The News-Press seeks to support its First Amendment argument with reference to *Ampersand I*, a case that is directly on point but was not cited by the company in its exceptions or motion for reconsideration. *See* P.O.B. 21-27. That case, of course, did not come down until December 2012—more than two years after the parties filed their exception and some two months after the deadline to seek reconsideration. *See* 9 C.F.R. § 102.48(d)(2). The Board nonetheless cited *Ampersand I* sua sponte, explicitly recognizing that the decision cast doubt on some of its holdings with regard to the various ULPs at issue, but because the News-Press did not amend its fully briefed motion to argue that the decision warranted reconsideration,[6] the Board held it was

[6] The Board cites nothing suggesting that the practice is either widespread or required. And the company is aware of only a single instance in which the Board entertained such a thing. That case, cited in the 2013 reconsideration order, *Ampersand*, 359 N.L.R.B. No. 127, 1-2 n.5 (citing *Ideal Mkt.*, 211 N.L.R.B. 344

thereafter barred from relying on the case. *Ampersand*, 359 N.L.R.B No. 127, 1-2 n.5 (citing 29 U.S.C. § 160(e); *Ideal Mkt.*, 211 N.L.R.B. 344; *Stephens Media*, 677 F.3d at 1254-55; *W&M Props.*, 514 F.3d at 1345-46). Like the administrative decisions in *FLRA* and *HTH Corporation*, which raised and rejected arguments sua sponte, the Board's treatment of *Ampersand I* is an "extraordinary circumstance," excusing the News-Press' failure to cite the case below.

But there's more. By the time the News-Press sought reconsideration, the Board had already rejected the News-Press' First Amendment defenses no fewer than *five other times* in the course of the broader dispute between the News-Press and the Union. For instance:

1. The Board mounted a firm opposition to the News-Press' First Amendment defense before the Central District of California in *McDermott I*, which reviewed in part ALJ Kocol's rejection of the First Amendment defense in *Ampersand Publ'g, LLC*, No. 31-CA-27950, 2007 WL 4570524 (N.L.R.B. Dec. 26, 2007).[7]

(1974), is an outlier though because the motion for reconsideration at issue there referenced an appellate decision for support, but expressly requested that the Board defer deciding on the motion pending review by the Supreme Court in case further briefing would be required. *Ideal Mkt.*, 211 N.L.R.B. 344, 1.

[7] *See* Petitioner's Reply to Respondent's Opposition to Motion for Temporary Injunction, *McDermott v. Ampersand Publ'g, LLC*, No. 08-1551, 2008 WL 8628728 (C.D. Cal. May 22, 2008), 2008 WL 2132560.

2. Unsuccessful before the district court, the Board then appealed the decision to the Ninth Circuit, again resisting the News-Press' freedom of the press claims.[8]

3. After losing before the Ninth Circuit on First Amendment grounds, the Board reaffirmed the Kocol decision in 2011, explicitly rejecting the force of the binding precedent set forth in *McDermott II*. *Ampersand Publ'g, LLC*, 357 N.L.R.B. No. 51, 6-9 (Aug. 11, 2011).

4. *In this very case*, the Board adopted ALJ Anderson's brusque rejection of the *McDermott* First Amendment analysis as irrelevant to the dispute for anything more than academic purposes, a finding the News-Press challenged in its Exceptions to the ALJ Decision. *Ampersand*, 358 N.L.R.B. No. 141, 1-4, 11; Resp. Exceptions 7-8; Resp. Br. Supp. Exceptions 3-5.

5. On April 17, 2014, just months before the Board's post-*Noel Canning* affirmation of its decision in this case, the Board summarily denied a motion to dismiss grounded in *Ampersand I*'s First Amendment analysis and brought by the News-Press in in a third case against the paper.[9]

In short, the Board has never taken seriously the News-Press' pleas that its First Amendment rights be given proper

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[8] *McDermott II*, 593 F.3d 950; Reply Brief for Petitioner-Appellant National Labor Relations Board 1, *McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950 (9th Cir. 2010), 2008 WL 6690747.

[9] NLRB Order Denying Motion to Dismiss, *Ampersand Publ'g, LLC*, Nos. 31-CA-029759, et al. (N.L.R.B. Apr. 17, 2014), *available at* http://apps.nlrb.gov/link/document.aspx/09031d45816adc71; Motion to Dismiss 1, *Ampersand Publ'g, LLC*, Nos. 31-CA-029759, et al. (N.L.R.B. Mar. 3, 2014), *available at* http://apps.nlrb.gov/link/document.aspx/09031d458160eaed.

consideration. Rather, every time the News-Press has raised the issue, the Board has either fought it or summarily rejected it. There would have been no reason to believe that a motion for reconsideration—on a decision that was already twice affirmed by the Board—would suddenly inspire the Board to change its position. Under these circumstances, it is apparent the Board would have flatly rejected any motion for reconsideration predicated on the News-Press' First Amendment freedom of the press defense.

Concededly, "the requirement that a litigant present [a motion for reconsideration] is ordinarily not excused simply 'because the [[Board]] was unlikely to have granted it.' " *FLRA*, 2 F.3d at 1196 (quoting *Van Dorn Plastic Mach. Co. v. NLRB*, 881 F.2d 302, 306 (6th Cir. 1989)). But, when paired with the Board's sua sponte citation of and subsequent refusal to apply *Ampersand I*, "the patent futility of a rehearing petition constitutes an extraordinary circumstance," excusing the News-Press of its failure to object. *Id.* No purpose is served by requiring "the petitioner to ask the Board to abandon a position which it has steadfastly maintained despite a decidedly cool reception by the courts of appeal; such an objection would amount, in this instance, to an exercise in futility, and it would not serve the salutary purpose of [section] 160(e)." *Kitchen Fresh*, 716 F.2d at 358.

In a last-ditch effort to convince the Court to ignore the News-Press' defenses, the Board incredibly declares that it would be "sandbagged" by any "extraordinary circumstances" argument because the News-Press did not address it in its opening brief. R.B. 74-75. But a petitioner is not required to divine every defense that a respondent might raise and, in an abundance of caution, rebut those defenses in its opening brief or risk waiving the opportunity to respond to them at all. *Alicea-Hernandez v. Cath. Bishop of Chi.*, 320 F.3d 698, 701 (7th Cir. 2003) (finding argument "that appellant waived any response to the waiver charge by not addressing it in her opening brief" was meritless because an appellant is not required "to anticipate and preemptively address all defenses that an appellee might raise") The appropriate place for such rebuttals is on reply. *See* Hon. Jacques L. Wiener, Jr., *Ruminations from the Bench: Brief Writing and Oral Argument in the Fifth Circuit*, 70 Tul. L. Rev. 187, 195 (1995) ("The sole purpose of the reply brief is to rebut matters addressed in the brief or briefs of your opponent(s)."). What's more, an argument is not waived if made in response to an argument raised by the respondent's brief. *E.g.*, *United States v. Van Smith*, 530 F.3d 967, 970 n.2 (D.C. Cir. 2008); *Envtl. Def. Fund v. E.P.A.*, 210 F.3d 396, 401 n.8 (D.C. Cir. 2000).

This not a case, like that relied on by the Board, R.B. 73 (citing *N.Y Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007), where the petitioner sat silently on a theory that would entitle it to relief and sprang to raise it on reply. The News-Press laid out its various arguments, and the Board responded with its defenses, including section 10(e) waiver. The Board had every opportunity to fully address the 10(e) analysis, which (under the Board's own theory) necessarily includes a discussion of whether "extraordinary circumstances" excuse any failure to act. Section 10(e) explicitly lays out the exception. The Board anticipated that the company would address it, and it in fact had the opportunity to establish that the exception should not apply in its briefing. R.B. 73-75.

It seems that, rather than the News-Press disadvantaging the Board, it is the Board that hopes to "sandbag" here. The Board pulls a single footnote from among thousands of pages of record in this case to suggest that the News-Press had sufficient notice of the Board's observation. But footnotes are notoriously overlooked. If the Board wanted its remarks to have the drastic effect of wholly foreclosing arguments on appeal, it should have placed them in the body of the order, where the reader's eyes are. The Board nonetheless uses the footnote to fortify its waiver argument,

shielding it from rebuttal and giving the Board the only word as to whether the News-Press waived its central defense. The Court should not reward the Board's tactics by throwing out the News-Press' argument altogether.[10]

Again, the News-Press repeatedly asserted its First Amendment rights of free expression in response to the Union's and the Board's constant barrage of ULP charges, investigations, and prosecutions—in this very case and others. The record shows that the company has never waived the argument. Whatever specific iteration of the First Amendment argument that the News-Press might have made for the first time on appeal should be heard because "extraordinary circumstances" exist.

B. The News-Press' First Amendment Defense Is Not an Untimely Attack on the Union's Certification

Labeling the News-Press' First Amendment argument a "collateral attack" on the Union's certification, the Board finally urges the Court to reject the defense because the company waived any objection to certification once it began negotiating. R.B. 75-76 (citing *Technicolor Gov't Servs., Inc. v. NLRB*, 739 F.2d 323, 326-27

[10] To the extent the rebuttal could somehow constitute a surprise, however, the News-Press would not oppose additional, limited briefing regarding "extraordinary circumstances."

(8th Cir.); *accord King Radio Corp. v. NLRB*, 398 F.2d 14, 20 (10th Cir. 1968)). The argument lacks merit.

This is not a case where the employer simply contests the legality of the election or union tactics in securing majority support. *But cf.* R.B. 75 (citing *NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012) (objecting to union election based on threats, harassment, and unlawful electioneering)). Nor is it a case where the employer merely disputes the legitimacy of the Union as representative "because employees selected it for *unprotected reasons*." *But cf.* R.B. 75 (citing P.O.B. 20-31) (emphasis added).

Rather, it is a case where the Union has continuously sought to abrogate an employer's First Amendment rights of free expression. *See supra* Part I. And the Board—a governmental agency—has fought forcefully to legitimize those aims. Sure, the employees organized for "unprotected reasons," but those reasons are not merely "unprotected." When given the full force of government retribution, they serve to violate the employer's fundamental rights. What's more, the Union continued its crusade for content control well beyond the organizing campaign and election. No case the Board cites holds that the News-Press waives an argument that the Board and Union have colluded to violate an employer's constitutional rights—before, during, and after

certification—simply by engaging in negotiations. *See* R.B. 75 (citing *Downtown Bid*, 682 F.3d at 112; *Technicolor Gov't Servs.*, 739 F.2d at 326-27; *King Radio*, 398 F.2d at 20)).

CONCLUSION

For these reasons and those detailed in Petitioner's Opening Brief, the News-Press respectfully requests that this Court grant its Petition for Review, vacate the Board's decision and order, and deny the Board's cross-application for enforcement.

And, as requested in its opening brief, the News-Press further requests that this Court enjoin action by the Board against the News-Press, including the filing and investigation of ULP charges, unless and until the Union can establish that a majority of its members no longer support its improper purpose.

Date: November 18, 2016

Respectfully submitted,

/s/ C. D. Michel

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B), and expanded in this Court's March 31, 2016 Scheduling Order, because it contains 7,333 words, exclusive of those parts of the brief exempted by Rule 32(a)(7)(B)(iii).

The foregoing brief also complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Bookman Old Style font.

Date: November 18, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2016, an electronic PDF of Petitioner's Reply Brief was uploaded to the Court's CM/ECF system, which will send notice of filing to counsel for all participants in the case who are registered CM/ECF users:

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